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**FACSIMILE TRANSMITTAL**

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**TO:****Name:** Mail Stop APPEAL BRIEF  
Group Art Unit 3738/Examiner Bruce Snow**Firm:** U.S. Patent & Trademark Office**Fax No.:** 571-273-8300**Subject:** U.S. Patent Application No. 09/553,573

Gary K. Michelson

Filed: April 19, 2000

ARTIFICIAL HEMI-LUMBAR NON-ARCUATE  
INTERBODY SPINAL IMPLANT HAVING AN  
ASYMMETRICAL LEADING END (as amended)

Attorney Docket No. 101.0077-00000

Customer No. 22882

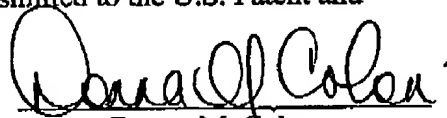
Confirmation No.: 3776

**FROM:****Name:** Amedeo F. Ferraro**Phone No.:** 310-286-9800**No. of Pages (including this):** 9**Date:** August 8, 2006**Confirmation Copy to Follow:** NO

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**Message:****CERTIFICATE OF TRANSMISSION UNDER 37 CFR 1.8**

I hereby certify that the attached Transmittal Form (in duplicate; the total amount of \$620.00 to cover the \$120 one-month extension fee and \$500 Notice of Appeal fee is to be charged to Deposit Account No. 50-3726), Pre-Appeal Brief Request for Review together with Form No. PTO/SB/33, and Notice of Appeal are being facsimile transmitted to the U.S. Patent and Trademark Office on August 8, 2006.

  
Donna M. Colon

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FORM PTO-1083

AUG 08 2006

Attorney Docket No.: 101.0077-00000  
Customer No. 22882

## IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re application of:

Gary K. Michelson, M.D.

Serial No: 09/553,573

Filed: April 19, 2000

For: ARTIFICIAL HEMI-LUMBAR NON-  
ARCuate INTERBODY SPINAL  
IMPLANT HAVING AN  
ASYMMETRICAL LEADING END (as  
amended)

Confirmation No.: 3776

Art Unit: 3738

Examiner: Bruce Snow

Mail Stop Appeal Brief - Patents  
Commissioner for Patents  
P.O. Box 1450  
Alexandria, VA 22313-1450

Dear Sir:

Transmitted herewith is a Notice of Appeal in reply to the Final Office Action dated April 12, 2006, in the above-identified application.

- ☐ No additional fee is required.
- ☒ Applicant hereby requests a one-month extension of time to respond to the above office action.
- ☒ A Form PTO/SB/33 and Pre-Appeal Brief Request for Review are enclosed.
- ☒ The total amount of \$620.00 to cover the \$120 one-month extension fee and \$500 Notice of Appeal fee is to be charged to Deposit Account No. 50-3726.
- ☒ The Commissioner is hereby authorized to charge any deficiencies of fees associated with this communication or credit any overpayment to Deposit Account No. 50-3726. **A copy of this sheet is enclosed.**
- ☐ Any filing fees under 37 C.F.R. § 1.16 for the presentation of extra claims
- ☒ Any patent application processing fees under 37 C.F.R. § 1.17

Respectfully submitted,  
MARTIN & FERRARO, LLP

Date: August 8, 2006

By:   
Amedeo F. Ferraro  
Registration No. 37,1291557 Lake O'Pines Street, NE  
Hartville, Ohio 44632  
Telephone: (330) 877-0700  
Facsimile: (330) 877-2030

RESPONSE UNDER 37 C.F.R. 1.116  
 RECEIVED EXPEDITED PROCEDURE  
 CENTRAL FAX CENTER EXAMINING GROUP 3764

AUG 08 2006 PATENT  
 Attorney Docket No. 101.0077-00000  
 Customer No. 22882

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:	)	Confirmation No.: 3776
Gary K. Michelson, M.D.	)	
Serial No.: 09/553,573	)	Group Art Unit: 3738
Filed: April 19, 2000	)	Examiner: Bruce Snow
For: ARTIFICIAL HEMI-LUMBAR NON-	)	
ARCuate INTERBODY SPINAL	)	
IMPLANT HAVING AN	)	
ASYMMETRICAL LEADING END	)	
(as amended)	)	

Mail Stop AF  
 Commissioner for Patents  
 P.O. Box 1450  
 Alexandria, VA 22313-1450

Sir:

**PRE-APPEAL BRIEF REQUEST FOR REVIEW**

In reply to the Final Office Action of April 12, 2006, the period for reply having been extended for one month by a request for extension and fee payment filed concurrently herewith, Applicant submits the following remarks for consideration by the Members of the pre-appeal brief conference.

**I. Brief Background**

The application includes three independent claims generally drawn to an artificial spinal implant. Independent claims 1, 102, and 147 stand rejected. In response to an Office Action mailed August 10, 2005, Applicant submitted a Reply dated February 7, 2006 (the "February 2006 Reply") traversing all of the Examiner's rejections under 35 U.S.C. §§ 102(e) and 103(a). The Examiner mailed a Final Office Action on April 12, 2006 maintaining all of the rejections.

**II. Clear Errors**

(1) The Examiner's rejection of claims 102-106, 108-135, 137-147, 149-168, and 172 under 35 U.S.C. § 102(b) as being anticipated by US. Patent No. 5,888,227 to Cottle (Cotte) is erroneous because:

Pre-Appeal Brief Request 8-8-06

Application No. 09/553,573  
Pre-Appeal Brief Request For Review dated August 6, 2006  
Reply to Final Office Action of April 12, 2006

(a) Cottle does not disclose an implant with a width less than one-half of the maximum width of the adjacent vertebral bodies having a third distance, which is measured from the junction of the leading end and interior side wall of the implant to the plane perpendicular to and bisecting the length of the implant along the mid-longitudinal axis of the implant, that is greater than a first distance, which is measured along the mid-longitudinal axis from the leading end to the perpendicular plane as recited in independent claim 102 (see February 2006 Reply, page 1, paragraph 3 and page 2, paragraph 1); and

(b) Cottle does not disclose an exterior facing sidewall that includes "a straight portion along the length of said implant," and that the leading and trailing ends of the implant "are adapted to rest upon portions of the apophyseal rim when implanted" as recited in Independent claim 147 (See February 2006 Reply, paragraph bridging pages 2 and 3).

(2) The Examiner's rejection of claims 1, 2, 4-34, 36-42, and 101-174 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,113,638 to Williams et al. in view of U.S. Patent No. 5,192,327 to Brantigan is erroneous because:

(a) neither Williams nor Brantigan disclose an artificial spinal implant with a hollow interior "having a maximum dimension between said inner surfaces of said interior and exterior facing side walls and in a plane perpendicular to the mid-longitudinal axis of said openings greater than said maximum dimension of said opening" as recited in independent claim 1 (see February 2006 Reply, page 3, paragraph 1);

(b) neither Williams nor Brantigan disclose the exterior facing side wall of the implant having a straight portion as recited in independent claims 102 and 147 (see February 2006 Reply, paragraph bridging pages 3 and 4);

(c) modifying the embodiments of Figs. 5A and 7A of Williams to be split into hemi-implants would interfere with the expansion mechanisms disclosed for each embodiment and would likely render the respective embodiments inoperable for the

Application No. 09/553,573  
Pre-Appeal Brief Request For Review dated August 6, 2006  
Reply to Final Office Action of April 12, 2006

intended purpose as taught in Williams (see February 2006 Reply, page 4, paragraph 1); and

(d) any modification of the larger implant of Williams with an expansion mechanism to be converted into two hemi-implants would require undue experimentation. (See February 2006 Reply, page 4, paragraph 2).

(3) The Examiner's rejection of claims 1, 2, 4-8, 11-34, 36-38, 40-42, and 101-174 under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 5,609,635 to Michelson ("Michelson '635") in view of Brantigan is erroneous because Michelson '635 already accomplishes without modification what the Examiner states is the reason to combine the teachings of Michelson '635 with Brantigan. (See February 2006 Reply, paragraph bridging pages 4 and 5).

### III. Conclusion

In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Members of the Pre-Appeal Brief Conference reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,  
MARTIN & FERRARO, LLP

Dated: August 8, 2006

By: 

Amedeo F. Ferraro  
Registration No. 37,129

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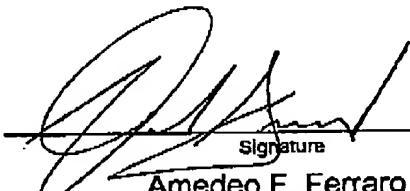
AUG 08 2006

Doc Code: AP.PRE.REQ

PTO/SB/33 (07-05)

Approved for use through xx/xx/200x. OMB 0851-D0xx  
U.S. Patent and Trademark Office; U.S. DEPARTMENT OF COMMERCE

Under the Paperwork Reduction Act of 1995, no persons are required to respond to a collection of information unless it displays a valid OMB control number.

PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional)	
		101.0077-00000	
I hereby certify that this correspondence is being deposited with the United States Postal Service with sufficient postage as first class mail in an envelope addressed to "Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450" [37 CFR 1.8(a)]  on _____  Signature _____  Typed or printed name _____	Application Number	Filed	
	09/553,573	April 19, 2000	
	First Named Inventor	Gary K. Michelson, M.D.	
	Art Unit	Examiner	
	3738	Bruce Snow	
Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.			
This request is being filed with a notice of appeal.			
The review is requested for the reason(s) stated on the attached sheet(s). Note: No more than five (5) pages may be provided.			
I am the			
<input type="checkbox"/> applicant/inventor.		Signature	
<input type="checkbox"/> assignee of record of the entire interest. See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed. (Form PTO/SB/96)		Amedeo F. Ferraro	
		Typed or printed name	
<input checked="" type="checkbox"/> attorney or agent of record.		310-286-9800	
Registration number 37,129		Telephone number	
<input type="checkbox"/> attorney or agent acting under 37 CFR 1.34.		August 8, 2006	
Registration number if acting under 37 CFR 1.34 _____		Date	
NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below".			
<input checked="" type="checkbox"/> *Total of 1 forms are submitted.			

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

If you need assistance in completing the form, call 1-800-PTO-9199 and select option 2.

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MARTIN & FERRARO, LLP

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August 8, 2006

Office of Patent Counsel  
MEDTRONIC SOFAMOR DANEK  
1800 Pyramid Place  
Memphis, TN 38132

Attn: Jeff E. Schwartz, Esq.  
(Acting In-House Counsel)

Re: U.S. Patent Application Serial No. 09/553,573  
April 19, 2000  
ARTIFICIAL HEMI-LUMBAR NON-ARCUATE  
INTERBODY SPINAL IMPLANT HAVING AN  
ASYMMETRICAL LEADING END (as amended)  
Our Ref No.: 101.0077-00000


Dear Jeff:

We have proceeded with the preparation and filing of a Pre-Appeal Brief Request for Review, and a Notice of Appeal in the U.S. Patent and Trademark Office with respect to the above-identified application. Enclosed are the as-filed documents for your records.

We will keep you informed of further developments.

With best regards,

Sincerely,



Amedeo F. Ferraro

AFF/dmc  
Enclosures

cc: Noreen Johnson, Esq. (w/out encl.)  
Thomas H. Martin, Esq.